Case, Inc. *and* International Ladies' Garment Workers' Union, AFL-CIO. Cases 9-CA-14561 and 9-CA-14862

October 15, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 1, 1981, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed limited cross-exceptions and a brief supporting the cross-exceptions and answering Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

On July 20, 1981, the United States Court of Appeals for the Sixth Circuit issued its opinion in *N.L.R.B.* v. *Gibraltar Industries, Inc.*, 653 F.2d 1091, in which it denied enforcement of a bargaining order issued against Respondent in *Case, Inc.*, 237 NLRB 798 (1978). The violations found by the Administrative Law Judge in the instant case, that Respondent violated Section 8(a)(3) and (1) of the Act by unduly delaying reinstatement of unfair labor practice strikers and by its refusal to pay holiday pay to strikers who were reinstated, are based on his finding that employees were engaged in an unfair labor practice strike. The strike was in response to Respondent's posting of piece rates on February 9, 1979, to become effective the following day for work on chemical garments. Prior to this time such work had been hourly paid, and several employees who felt that the rates were too low and production quotas too high discovered that Respondent had not bargained with the Union about the change. Thereafter, approximately 50 percent of Respondent's 250 employees went on strike, carrying signs which read "Case on Strike—Unfair Labor Practices." The strike continued into October when the Union sent Respondent a telegram announcing the employees' intention to return to work unconditionally.[1] The Administrative Law Judge found that Respondent's delayed reinstatement of unfair labor practice strikers and its refusal to pay holiday pay to strikers who did return violated Section 8(a)(3) and (1) of the Act.

The decision of the court, however, invalidating the earlier bargaining order, absolved Respondent of any duty to bargain with the Union, and therefore employees who went out on strike in protest of Respondent's unilateral change in piece meal rates were economic, rather than unfair labor practice strikers. Since the allegations of the complaint and the issues litigated concerned only the question of whether unfair labor practice strikers were reinstated in a timely fashion and consequently whether employees were entitled to holiday pay, and depended upon the Board's bargaining order being sustained, we shall dismiss the complaint in its entirety.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] Due to an error in transmission there was a question as to whether the offer was unconditional. The issue was litigated at the hearing and the Administrative Law Judge found that the offer was unconditional as of October 26, the date of the first telegram.

[2] We shall therefore deny Respondent's motion to reopen the record. In reaching this result we must specifically point out that in the circumstances of this case there is no basis for the Administrative Law Judge's finding that under the doctrine enunciated in *The Laidlaw Corporation*, 171 NLRB 1366 (1968), Respondent would be liable for its delay in reinstating these strikers even if they were determined to be economic rather than unfair labor practice strikers. Respondent's conduct was neither alleged nor litigated as a violation of *Laidlaw* and the record contains no evidence upon which to make such a determination.

DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Administrative Law Judge:[1] The charge in Case 9-CA-14561 was filed on November 16, 1979,[2] by International Ladies' Garment Workers Union, AFL-CIO, herein called the Charging Party or Union, against Case, Inc., herein called the Company or Respondent, alleging that Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, by refusing to reinstate unfair labor practice (ULP) strikers following their unconditional offer to return to work. That charge was amended on December 11 to specify individuals who had, as of that time, not been reemployed by Respondent.

The Regional Director issued a complaint in that case on December 13 alleging that the Union represented a production and maintenance (P & M) unit at Respondent's Olive Hill, Kentucky, plant and that the Board had

[1] During the hearing in this matter, on motion, Case 9-CA-15360(1) was severed and dismissed, and the charge withdrawn by the Union.

[2] Unless specified otherwise, the events in this matter took place during 1979.

ordered Respondent to bargain with the Union for that unit in its Decision at 237 NLRB 798 (1978). The complaint stated that Respondent continued to refuse to bargain with the Union and had unilaterally issued and implemented piece rates for work on chemical garments and attempted to negotiate directly with its employees concerning wages and other terms and condition of employment, and that the employees had engaged in a ULP strike beginning on February 20 which continued until October 26, when an unconditional offer to return to work was made by the Union on the Union on the strikers' behalf.

The charge in Case 9-CA-14862 was filed by the Union against Respondent on February 6, 1980, alleging, among other things, that Respondent had not returned certain of the strikers to work and had failed to pay them holiday pay because they engaged in the strike. On March 18, 1980, the Regional Director issued an order consolidating cases, amended consolidated complaint and notice of hearing, consolidating the two cases above and alleging that the Union's October 26 telegram offering unconditional return by the strikers was clarified by a union telegram on October 30 and that on and after that date Respondent had failed and refused to reinstate the employees listed in Appendix A to the complaint and refused to pay the employees in Appendix B their holiday and Christmas pay, all because the employees had engaged in a ULP strike and concerted activities.

The charge in Case 9-CA-16360 was filed on May 23, 1980, and, as noted in the footnote *supra*, was withdrawn during the hearing.

Respondent filed timely answers in Case 9-CA-14561 and to the consolidated complaint, which admitted the jurisdictional and commerce allegations, the status of the Union, and that Gene Case is Respondent's president and a supervisor, but denied the appropriateness of the P & M unit and that the Union represented a majority of its employees. Respondent agreed that it had refused to bargain and that certain of its employees engaged in a strike, but denied that the strike was caused or prolonged by its unfair labor practices and denied the remaining allegations of the complaint.

The principal questions to be answered are whether the strike was caused in whole or part by Respondent's unfair labor practices, and if so, whether the offer to return was unconditional and when that was made clear to Respondent and, lastly, whether there was an obligation on Respondent to pay holiday pay to its returned employees. I have concluded that the strike was caused in part by Respondent's unfair labor practices and that the Union, on October 30, made clear to Respondent that the offer of the strikers to return to work was unconditional and that they should have been reinstated within 5 days. Therefore, all returning strikers should have been reinstated by November 5 and would have been eligible for December and January holiday pay. Respondent raised a secondary issue as to whether all of the employees who did not work during the strike were strikers, and I have determined that all of the employees who did not work for Respondent during the period of the strike and were not shown on Respondent's records as voluntary quits or dismissals are to be considered strikers for whom an offer to return was made by the Union.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally at the hearing held in Grayson, Kentucky, on August 19, 1980. Briefs from Respondent, the Union, and the General Counsel have been carefully considered.

On the entire record in this case, including the exhibits and testimony, and noting the stipulations and uncontradicted testimony, and on my evaluation of the reliability of witnesses based on the evidence and their demeanor, I make the following:

FINDINGS OF FACT

I. COMMERCE FINDINGS AND UNION STATUS

Case, Inc., is a Kentucky corporation engaged in the manufacture of wearing apparel at its Olive Hill, Kentucky, plant. During the past year Respondent sold and shipped, directly to points outside of Kentucky, goods, materials, and products valued in excess of $50,000.

Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

Respondent admits, and I find, that the Union herein is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background and Undisputed Facts*

In a previous consolidated proceeding against Respondent and another corporation, a hearing was held in June 1977 before Administrative Law Judge Claude R. Wolfe who issued his Decision on November 30 of that year. Administrative Law Judge Wolfe found that Respondent had violated Section 8(a)(1), (3), and (5) of the Act and set aside an election, due to Respondent's unfair labor practices, and entered a bargaining Order. The Board approved Administrative Law Judge Wolfe's findings in its Decision and Order, 237 NLRB 798, and found that Respondent's bargaining obligation to the Union dated from September 15, 1976, on. This Decision is in the enforcement stage in the United States Court of Appeals for the Sixth Circuit, herein Sixth Circuit, and has been argued and is awaiting decision.

The Union filed additional charges against Respondent in Cases 9-CA-11866, 9-CA-13610, and 9-CA-14234. The parties entered into a settlement agreement which was made contingent on enforcement of the prior proceeding in the Sixth Circuit or to any ruling thereafter entered by the United States Supreme Court. If the Sixth Circuit or the Supreme Court denies enforcement of the bargaining order, the General Counsel agrees to dismiss the 8(a)(5) allegations in two of the cases in the settlement agreement. If the Board's Order is enforced, Respondent will then comply with the terms of the settlement agreement. The agreement provided it did not settle the issue of whether the February 20 strike was caused by unfair labor practices. As part of the settlement, the parties stipulated as follows:

1. On or about February 15, 1979, Case, Inc., unilaterally established original piece rates for chemical suits which had previously been produced by emloyees paid hourly wages.

2. On or about February 20, 1979, Case, Inc., acting through its president, Gene Case, dealt directly with its employees concerning their compensation and other terms and conditions of employment.

3. On or about February 20, 1979, employees of Case, Inc., commenced a strike carrying picket signs bearing the legend "Case on strike—Unfair Labor Practices."

4. The settlement agreements, in Cases 9-CA-11866 and 9-CA-13610 do not resolve, or foreclose litigation of, any aspect of the unfair labor practice strike issue alleged in Case 9-CA-13610, which allegation remains under active consideration for further processing, and the General Counsel specifically reserves the right to litigate said issue in any future proceedings.

5. This stipulation is binding upon all parties hereto for the purpose of the further processing of Cases 9-CA-13610 and any future proceedings.

Respondent filed charges in Cases 9-CB-4181 and 9-CB-4241 against the Union alleging strike misconduct of employees, and the Regional Director issued a complaint on July 27 alleging conduct by eight named strikers and some unknown individuals as violative of Section 8(b)(1)(A) of the Act. The parties entered into a settlement stipulation, signed in August and September, providing that the Union, its officers, and agents would desist from certain conduct and post a notice with the further provision that the Order could be enforced by a circuit court.

The parties agree that a number of employees, generally considered to be 21, left Respondent's premises on February 20 and set up a picket line at the plant around 4 p.m. with signs saying "Case on strike—Unfair Labor Practices." They further agree that about half or 125 of Respondent's 250 employees did not work during the strike.

Respondent stipulated that it did not reinstate any strikers within 5 days of October 30, 1979, and further had not reinstated any strikers within 5 days of November 16, 1979, because, as Respondent counsel stated during the hearing, "I'm not conceding there ever was an unconditional offer, to the extent any offer was made, it certainly couldn't have been made before November 16."

In regard to holiday pay, Respondent has rules that an employee must be employed 30 days prior to the date of any holiday and work the day before and the day after to get paid for the holiday. With the exception of two employees listed in Appendix B to the complaint, none of those employees received any holiday pay, indicating that they were reinstated, presumably sometime in December or thereafter, and did not receive anv holiday pay on the basis of Respondent's interpretation of its rules. Respondent took the position that after employees were out of work for 3 months that they would have to requalify by working 30 days before holiday pay could be granted.

B. *The Events of February 19, 20, and 21*

There is no denial of the testimony of several employees that around 3 p.m., February 19, shortly before quitting time, Respondent posted piece rates to become effective the next day for a line of chemical clothing it was manufacturing. Prior to that time the employees had been paid on a straight hourly rate. According to the employees, there was some discussion of those rates at that time and again on the following morning.

Sina Yonts, who was one of the employee union leaders in the plant, testified that a number of employees talked to her the following morning before the shift started, complaining that the posted rates were too low and production quotas too high, and they wanted to know if the Union and the Company had bargained about those rates before Gene Case set them. Yonts did not work in the area where the chemical garments were being made but was an inspector in another unit. She called J. Lavine who was the director of organizers for the Union and told him that the employees had complained to her that they were dissatisfied with the rates, that the chemical garments were giving them rashes, and that they wanted to know if Respondent and the Union had bargained about those rates before they had been set by Case. Lavine said there had been no bargaining between the Union and the Company and, to her question as to whether they could strike about it, advised that they could strike due to the fact that the Union had not been contacted and the Company had unilaterally made and posted the rates and that such a strike would be an unfair labor practice strike.

Yonts met with a group of employees during lunchtime and told them what Lavine had said about their being able to strike because of the unfair labor practices. Although some of the employees could not recall exactly what Yonts said, there is no denial of it and the fact that the picket signs carried a legend would tend to corroborate that she had so told the employees. They talked among themselves and agreed that, after they went back to work at noon, anyone who wished to strike would stand up at 12:30 p.m. and walk out of the plant. She stated that just before 12:30 p.m. Gene Case came out into the plant and motioned one of the two groups who worked on the chemical garments to go to the break room.

Ambus Henderson testified that she was in the group that went first and that Case told them some of the rates might have to be adjusted but he would work with them and get them right. Some of the employees asked about the abrasiveness of the cloth and the rates, and after about 20 minutes they were told to back to work. Another employee, Patricia Burchett, said that she was in one of the groups and that, after Case said he knew there were some problems with the rates and they would straighten them out if they worked with him, he told them to go back to their machines and behave themselves. Burchett said the word was passed around among the employees that if they still wanted to strike, they should stand up at 2:30 p.m. and walk out.

Yonts stated that at 2:30 p.m. a number of employees stood up and started to walk out and at that time Case

came into the plant with a camera and started to take pictures. Twenty-one employees clocked out and left the plant. At that time, according to Henderson, after Case had taken some pictures of those who were walking out, some of the employees who had been standing sat down. Case went to the timeclock, pulled the cards of those who had clocked out, and said loud enough for her to hear that those who had walked out were fired. Another of the employee union leaders named Benyon went around to some of the employees and cautioned them not to walk out at that time.

Mary Buckler stated that she worked until about 3 o'clock and left the plant after she got a message that her son was injured and when she came back to the plant the next day she joined the picket line.

As noted above, it was stipulated that the pickets carried signs that said, "Case on strike–Unfair Labor Practices." Yonts testified that when the employees left the plant on February 20 they made these signs on the parking lot and started carrying them and picketing when the shift left the plant at 4 p.m.

Gene Case was called under Section 611(c) of the Federal Rules of Procedure and testified that he had noticed a group meeting in the parking lot on February 20 as he returned from lunch. He stated that he did talk to employees that day and there was some discussion of piece rates. He told the employees that if adjustments were needed in the pay rate they would do so. He further testified that on the following day, February 21, only about 50 percent of the employees reported to work. In response to questions by Respondent counsel, Case said that he could not recall any particular persons on the picket line other than some few that he named and stated that no one wrote to Respondent and said they were on strike. He admitted he did not know all of the strikers who were listed in Appendix A of the complaint and he could not say they were on the picket line or not or if they were on strike or not.

The strike continued into October and, on October 26, the Union sent a mailgram to Gene Case at the Company as follows:

> THE ILGWU ITS UPPER SOUTH DEPARTMENT, ON BEHALF OF ALL STRIKING EMPLOYEES OF CASE INC, HEREBY OFFER UNCONDITIONALLY TO RETURN TO WORK FORTHWITH. THIS OFFER IS A CONTINUING ONE. PLEASE NOTIFY THESE EMPLOYEES AND ALL OTHER STRIKERS WHEN THEY SHOULD REPORT TO WORK AND SEND US A COPY THEREOF.

The mailgram which was received by Respondent had the word "conditional" in place of "continuing." On October 29, Respondent counsel sent a telegram to counsel for the Union as follows:

> YOUR RECENT COMMUNICATION ADDRESSED TO THE ABOVED NAME HAS BEEN REFERRED TO US FOR RESPONSE. PLEASE FURNISH US WITH THE FOLLOWING INFORMATION IMMEDIATELY SO THAT YOUR COMMUNICATION CAN PROPERLY BE RESPONDED TO AND APPROPRIATE STEPS TAKEN:
>
> 1. YOU STATE THAT THE EMPLOYEES UNCONDITIONALLY OFFER TO RETURN BUT THAT THE OFFER IS A CONDITIONAL ONE. PLEASE CLARIFY AND SET FORTH THE CONDITION.
>
> 2. PLEASE SET FORTH THE NAMES, CURRENT ADDRESSES AND TELEPHONE NUMBERS OF THE STRIKING EMPLOYEES WHO ARE PREPARED TO RETURN TO WORK AND THE DATE EACH IS ACTUALLY PREPARED TO RETURN. THIS INFORMATION IS ESSENTIAL IN AS MUCH AS WE DO NOT HAVE A LIST OF ALL EMPLOYEES WHO ACTUALLY WENT ON STRIKE AND AS TO SOME STRIKERS WE HAVE INFORMATION THAT THEY ARE IN FACT NOT INTERESTED IN RETURNING TO WORK AT CASE INC.
>
> 3. WHAT ASSURANCE CAN YOU GIVE THAT THE OFFER DOES NOT REPRESENT ANYTHING MORE THAN A TEMPORARY BRAKE [SIC] IN THE STRIKE. SPECIFICALLY CAN THE EMPLOYER BE ASSURED THAT THE EMPLOYEES ONCE RETURNING WILL NOT IMMEDIATELY OR SHORTLY THEREAFTER STRIKE AGAIN.
>
> YOUR IMMEDIATE RESPONSE WILL BE GRATELY [SIC] APPRECIATED.

The Union responded on October 30 with the following mailgram:

> WE HAVE RECEIVED YOUR MAILGRAM OF OCTOBER 24. 1. THE OFFER IS UNCONDITIONAL. 2. MANY FORMER STRIKERS HAVE ALREADY MADE OFFERS IN PERSON TO RETURN TO WORK AND HAVE GIVEN YOU THEIR ADDRESSES AND TELEPHONE NUMBERS. YOU KNOW BETTER THAN WE THE NAMES ADDRESSES AND TELEPHONE NUMBERS OF YOUR EMPLOYEES. TO OUR KNOWLEDGE THEY ARE PREPARED TO RETURN TO WORK NOW OR UPON REASONABLE NOTIFICATION. 3. THIS IS NOT A TEMPORARY BRAKE IN THE STRIKE.

Respondent's counsel thereafter sent a letter to counsel for the Union questioning whether there was an error in the first telegram and noted that the Union did not give Respondent the names, addresses, and telephone numbers of the strikers and asked for more information concerning those two items. Nothing was stated in the letter about the erroneous date in the Union's second telegram which should have been October 29 rather than October 24. The Union's counsel replied on November 5, again stating that the offer to return was unconditional and enclosing a copy of the Union's original telegram with the word "continuing" rather than "conditional" in it. On November 7, in another letter to the Union's counsel, Respondent's counsel stated they still had not resolved whether the communication was a conditional or unconditional offer and that a few of the employees who had left since February had personally requested reemployment and that Respondent would consider that those were the only employees who desired reemployment.

On November 13, union counsel wrote to Respondent counsel stating that Respondent's assumption concerning the strikers wishing to be reemployed was incorrect and there was no legal requirement that strikers make an application since they were unfair labor practice strikers who had unconditionally offered to return. The letter

further stated that the telegram which was telephoned in and sent on October 26 used the word "continuing" rather than "conditional" and repeated once again that the offer to return was unconditional, as the Union placed in the October 26 and again in the October 30 mailgrams.

C. *The Contention of the Parties*

Respondent disputes that the strike was an unfair labor practice strike on two bases. First, it urged that some of the General Counsel's witnesses were unhappy with the rates and if the rates Gene Case posted had been acceptable to the employees they might not have struck because of Respondent's unilateral action. Respondent additionally attempts to impeach the credibility of Yonts, who testified to the ULP genus of the strike, on the basis that the Regional Director dismissed a charge filed on her behalf because she allegedly was involved in some strike misconduct, and her having been named, but not indicted, in an indictment naming eight other strikers that "The Board" considered her neither objective nor trustworthy. This bootstrapping attack has nothing to do with the credibility of Yonts and her testimony concerning her talk with Union Organizer Lavine and discussion with the employees.

The fact that the General Counsel decided not to issue a complaint seeking Yonts' reinstatement has nothing to do with her credibility, and Respondent had not shown in any manner that it would impeach her. Being named, but not as a defendant, in an indictment produces nothing in regard to the credibility of the person, as Respondent counsel well knows. Whether such actions may have produced a bias is problematical, but here external facts corroborate Yonts.

Yonts stated she checked with the Union to see if the Company had bargaining with the Union about the rates because the employees considered them very low and the production requirement too high. Respondent claims this is implausible, but it would appear to be perfectly plausible. The employees would want to know if the Union had agreed to the setting of these low rates and high production requirements.

Respondent claims that there was no strike when the Company took other unilateral action, but this is not a reasonable test as to whether the strike at this time was caused, at least in part, by Respondent's unilateral action. Here the duty to bargain had been established, according to the Board, over 2-1/2 years prior to this unilateral action. I would think it reasonable that, if the Company had posted rates of an astronomical figure where employees would make a lot of money, the employees might not have been interested in striking. But here there was a combination of things to motivate them. The fact is that they felt the rate were too low and they wanted Yonts to find out whether there had been negotiations on those rates, and this testimony is undenied. That some of the employees who attended the meeting did not remember everything that was said does not detract from Yonts' testimony. Indeed the establishment of the picket line with the signs prepared by the employees stating it was a ULP strike corroborates her testimony rather conclusively. I credit Yonts' testimony.

Secondly, Respondent attacks the nature of the strike on the basis that it has a *Laura Modes* defense due to picket line violence and that it does not admit it has a duty to bargain with the Union based to some extent on this *Laura Modes* defense. [*Herbert Bernstein, Alan Bernstein, Laura Bernstein, a co-partnership d/b/a Laura Modes Company*, 144 NLRB 1592 (1963).] Respondent reasons that there can be no unfair labor practice strike based on a claim of 8(a)(5) unilateral action if it had no duty to bargain with the Union. In essence, its defense here, as was its defense in the stipulated settled cases referred to *supra*, is based on its denial of a duty to bargain with the Union.

The present law of this case is the Board's Decision and Order in 237 NLRB 798 that Respondent has a duty to bargain with the Union and therefore, where the strike was partially based on Respondent's unilateral action in posting rates which Respondent's employees felt were too low, this strike was an unfair labor practice strike with a consequent duty on Respondent to reinstate the strikers within 5 days of their unconditional offer to return (October 30), and I so conclude and find. Since it is stipulated that Respondent did not reinstate any of the strikers within 5 days of October 30, I find that Respondent violated Section 8(a)(1) and (3) of the Act and will recommend that Respondent make the strikers whole by paying them backpay commencing on November 5, 1979.

The General Counsel and the Union contend that the first telegram was proper and stated an unconditional offer to return and that Western Union had erred and inserted "conditional" for "continuing." They say that, if the unconditionality of the offer was not clear because of that error, certainly it was made clear to Respondent by the telegram of October 30 which seriatim answered Respondent's questions in its October 29 telegram and said the offer was unconditional.

Respondent states that it never sent an October 24 telegram to which the October 30 telegram was a purported reply and that it had two conflicting telegrams from the Union and did not know whether the offer to return was conditional or unconditional. It is apparent that the Union did not know of Western Union's transmission errors.

In reviewing Respondent's October 29 telegram and the Union's October 30 telegram, it is clear that the Union's telegram was a direct reply to Respondent's telegram in the particulars requested by Respondent. For example, Respondent said, "You state that the employees unconditionally offered to return but that the offer is a conditional one. Please clarify and set forth the conditions." The Union's answer is, "The offer is unconditional," which would appear to leave no room for misinterpretation and to deny there were any conditions. Respondent's belated argument that the Union's telegram referred to an October 24 telegram from Respondent is frivolous, since it is clear from the content of the two telegrams that the Union's October 30 telegram is a direct point-by-point response to Respondent's October 29 telegram and that the October 24 date must be a clerical error.

I find and conclude that the October 30 telegram made it clear that the Union's offer for the strikers to return to work was unconditional but that Respondent, instead of acting on it, engaged in dilatory tactics attempting to obfuscate the situation. I further find and conclude, as the stipulation provides, that Respondent did not reinstate the employees by November 5 and therefore violated Section 8(a)(1) and (3) of the Act. By such inaction in not timely reinstating the strikers, and then enforcing its 30-day rule on holiday pay, Respondent unfairly euchred its strikers out of their December and January holiday pay. Respondent did not offer any reasons, other than saying it had not received a proper unconditional offer for all strikers to return, for not reinstating the strikers before sometime in December or January. Therefore backpay, including holiday pay, will be ordered for all strikers beginning November 5, 1979, until they were properly reinstated.

Even if the returning strikers did not work either the day before or the day after the holiday or both, they are still entitled to the holiday pay since Respondent's dilatory reinstatement of them may have removed the impetus from returned strikers to work those days. There is no basis for Respondent's argument that it is entitled to have the Union tell it the names, addresses, and telephone numbers of the strikers. The Union has fulfilled its obligation to Respondent and its duty on behalf of the strikers when it makes and communicates to the Employer an unconditional offer of the strikers to return to work. Employees who did not work during the strike are presumed to be strikers. In this case the undenied inhibiting, flagrant actions of Gene Case in photographing the strikers in the plant and stating that those who left were discharged is sufficent reason to demonstrate why other employees did not walk out on February 20. Consequently, Respondent's professed lack of knowledge concerning the status of employees who did not work during the strike was generated by Gene Case's actions.

Respondent sought to place the burden on the General Counsel and the Union to prove which, if not all the employees who did not work during the strike, were supporting the strike or were strikers. The Board has established the presumption to be that all employees who do not work during a strike are strikers and that Respondent may rebut that presumption by proving that employees quit, resigned, or took other permanent jobs demonstrating that they abandoned Respondent's employment. This Respondent here did not attempt to do so. Apparently Respondent confuses the term "strikers" with "pickets." It is not necessary for a striker to picket in order to retain his striker's status, since a striker is one who withholds his labor from his employer. All persons who did not work during the strike and who did not quit or resign their employment status are strikers, and I so find.

Assuming, *arguendo*, that this was not an unfair labor practice strike, I would find that, under the circumstances of this case, Respondent would still have a liability to the strikers because it delayed their reinstatement following an unconditional offer to return. Under the Board's *Laidlaw* doctrine economic strikers have a right to their former positions if they are not held by permanent replacement. [*The Laidlaw Corporation*, 171 NLRB 1366 (1968).]

Respondent resisted attempts to determine when the reinstatements here were made but did stipulated that it was not before November 21. Since those listed on Appendix B to the complaint did not receive Christmas or New Year's holiday pay, it would appear that reinstatements did not occur until December or later. Since Respondent had given no reasons other than its stated defenses for not reinstating the strikers shoftly after the unconditional offer was made (October 30), I would find that Respondent was dilatory in effectuating he reinstatements and that it violated Section 8(a)(1) and (3) of the Act thereby. In the at event, I would order backpay to begin for the employees on November 5, 1979, until they were properly reinstated, and any reinstatement questions could be resolved through a backpay proceeding.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section II and therein found to constitute unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, occurring in connection with Respondent's business operations, as set forth in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent engaged in the unfair labor practices set forth above, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the strikers were engaged in an unfair labor practice strike and that the Union made an unconditional offer to return to work on the strikers' behalf and that said offer was made clear to Respondent on October 30, 1979, and that Respondent did not reinstate strikers until some date following November 21, 1979, but that all strikers were offered reinstatement thereafter, I recommend that Respondent make all of the strikers listed in Appendixes A and B of the amended consolidated complaint whole for the earnings they lost because of Respondent's dilatory and delayed reinstatement of them, by payment to them of a sum equal to that which each would have normally received as wages from November 5, 1979, until each of them was fully reinstated including payment of the December and January holiday pay, less any net earnings for the interim. Backpay, plus interest, is to be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[3] I further recommend that Respondent make available to the Board, upon request, payroll and other records in order to faciliate checking the amounts of backpay due them and other rights they might be entitled to receive.

[3] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. A number of Respondent's employees engaged in an unfair labor practice strike from February 20 to October 26, 1979, and the Union made clear that the offer of the strikers to return to work was unconditional in its October 30, 1979, communication with Respondent.

3. Respondent violated Section 8(a)(3) and (1) of the Act by its dilatory and delayed reinstatement of its unfair labor practice strikers because they engaged in union and concerted activities among themselves and with other employees for the purposes of mutual aid and protection.

4. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to pay its strikers December and January holiday pay because it discriminatorily and without sufficient reason delayed the strikers' reinstatement.

[Recommended Order for dismissal omitted from publication.]